



INTELLECTUAL PROPERTY & THE DESIGN SECTOR: SAFEGUARDING THE FUTURE

About ACID and the ACID Council

ACID (Anti Copying in Design) is a membership organisation, dedicated to raising awareness about intellectual property within the creative industries to promote and encourage respect, ethics and compliance for intellectual property within corporate social responsibility. ACID is committed to helping its members protect their livelihoods to maximise growth. ACID will continue to be the leading voice for design & intellectual property to Government and policy makers to encourage and influence design law reform. Through its powerful logo, a tangible symbol of deterrence, ACID will continue to communicate a positive voice for IP creation.

The ACID Council was created as an advisory body comprising designer/maker members, ACID's Chief Counsel, a representative of our ACID Legal Affiliates and an international professor of law, academic and former President of INTA. It meets regularly to discuss matters of strategy and between meetings comments on various campaigning and public affairs issues affecting its members and the broader design community. The ACID Council is a guiding influence on design and IP strategy now and for the future.

Why does design matter?

It is beyond dispute that the design sector punches above its weight and its value has grown consistently over two decades generating £85.2bn in Gross Value Added (GVA) to the UK in 2016. This is 7% of the UK's GVA. Between 2009 and 2016 the GVA of the design economy grew by 52%. In 2016, there were 1.69m people employed in design roles, and there are 78,030 design-intensive firms¹.

The 'intellectual capital' of the design sector cannot be under-estimated. It is a critical asset to our future economic success. It is the DNA running through most businesses whether micro or macro. Its influence is a palpable presence in the work of individuals and design teams. When IP is devalued then this becomes a challenge to the sustainability of the design sector. Intellectual property (IP) is but one component of the intellectual capital of a design business often described as the intangible value of a business. IP is about respecting people (human capital) and their corporate endeavours.

From iconic to every day, design adds value, creates solutions. Design matters. **Certain questions emerge about future planning:** Is the current approach coordinated and strong enough for a UK national strategy against counterfeiting piracy and copying which threatens our economic stability, especially within the creative industries? Should the UK be thinking about future-proofing our valuable IP with the creation of a **National IP Crime Enforcement Body**. Continued funding of the Police Intellectual Property Crime Unit (PIPCU) is of significant value but their powers for enforcement are limited because resources are over-stretched. The same can be said of Trading Standards in relation to IP.

Facts - Intellectual Property protection in an uncertain world

Key findings of recent EU research of Intellectual Property-Intensive industries account for approximately 42 % of GDP (EUR 5.7 trillion) to the EU economy and 38 % of employment². However,

¹ <https://www.designcouncil.org.uk/resources/report/design-economy-2018>

² https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IPContributionStudy/p_the_European_Union/performance_in_the_European_Union_full.pdf

The ACID Council is a guiding influence on design and IP strategy now and for the future

"Design generated £85.2 billion in GVA to the UK in 2016"

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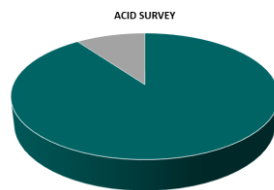
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IPR-intensive business success is being significantly challenged by IP infringements. EU 83 billion and 790,000 jobs are lost every year across the EU due to counterfeiting, copying and piracy.

The reasons for this failure include:

- Increasingly, through search engines, online marketplaces and through advertising, the promotion and distribution of copied products and illegal digital content proliferates. Whilst progress has been made, tracking down these unethical practices is a futile pursuit.
- Behemoth service providers continue to pay scant regard to IP theft by taking proactive and collective responsibility.
- Threats to brand owners and IPR intensive companies within the creative industries increase as they find their reputations and credibility consistently eroded. Lower prices, ease of access and the user-demand perception that it is an “OK” to buy fakes goods do little disincentivise what is becoming an insidious, increasing and a comparatively disregarded form of criminality.

90% of those questioned in a recent ACID survey said that copying was intentional and deliberate³.



IP Policy: What does ‘Safeguarding the Future IP framework’ look like?

Creating a long-term and effective intellectual property policy and framework for design is of critical importance to the UK design sector. Deal or no deal post Brexit. Government and policy makers must ensure they are creating a supportive IP framework under which UK firms can export to the world safely, knowing that access to a robust IP enforcement is in place. UK micro and SME design innovators must have effective cost and time legal support that deters copiers supported by a deterrent damages system. Such a system must disincentivise IP infringement by those who take the fast track to market by copying.

Respect for IP is incomplete in the absence of corporate social responsibility. This endorses the stark reality that stealing IP is the same as property theft. Few of us would steal from a shop but many happily buy fakes, counterfeits and copies with impunity, often putting themselves and their families at risk. *EU Customs have confirmed that over 30% of fakes coming to the EU have the potential to damage health and safety*⁴.

There is an ongoing disparity between design right infringement and copyright infringement. Albeit, the infringement of a registered design is now a crime, but the infringement of an unregistered design is still not a criminal offence and, as the majority of UK designers rely on unregistered design protection, this should be addressed sooner rather than later.

For effective policy to emerge, enlightened and informed anticipatory governance is essential not only looking at the creeping threats, trends and challenges of today but contemplating and reacting

³ www.acid.uk.com/news

⁴ <https://www.trademarksandbrandsonline.com/news/euipo-report-highlights-dangers-of-online-counterfeits-5249>

“For effective policy to emerge, enlightened and informed anticipatory governance is essential”

“Every now and then a new technology emerges which has the potential to demolish existing ways of manufacturing and delivering product and could disrupt current business models”.

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(with the benefit of history) to the issues of tomorrow. This requires a commitment to future-proofing⁵.

IP: What can we learn from history?

In the music sector, some thirty years ago with the emergence of digital technology, there were IP repercussions on the analogue industries – for example, when vinyl was replaced by CD. Twenty years ago, with the arrival of the internet there is now global, instantaneous delivery of perfect copies of content, and ten years ago the emergence of smart phones and internet connected TVs, transformed devices at home and in our pockets allowing for delivery of content as well content creation. IP law did not move in tandem with these technological breakthroughs. Future policy safeguard against repeating the mistakes of the past.

Over three decades has IP design policy considered anticipatory thinking into its future proofing as a result of history? In 2011 Professor Hargreaves⁶ said that UK design policy had been neglected. Has the status quo changed in 2018 with enlightened thought leadership within IP and design policy-making?

With the emergence of online design infringement becoming a significant issue and 3D printing technology already changing the design, engineering, technology and manufacturing, we believe this is the beginning significant changes. With 3D technology developing at a pace previously never experienced, opening new horizons to make bespoke 3D objects is easy, fine tuning prototyping and tailoring manufacturing as never before. Does this present opportunity for mass counterfeiting? We believe that more could be done now to help address these concerns.

Whenever new technology appears on the horizon, which has the potential to demolish existing ways of manufacturing and delivering product, this may have the potential to disrupt current business models. The challenge is to be positive about development through innovation maintaining existing legal protection for creators and designers of new product. An IP policy vision which focuses unduly on short termism should not be at the expense of the long-term interests of the UK design sector and other IPR-intensive industries.

Already in the [US](#) there are growing threats about 3D printing guns and weapons, As attorney Kelsey Wilbanks recently wrote, *“Obtaining the digital instructions to print and assemble an undetectable and untraceable 3D printed gun will probably soon be as simple as ordering and assembling home furniture.” In other words, the cat can’t be put back in the bag.*⁷

Working in collaboration & partnership to effect change

The UK IP Crime Report⁸ is a snapshot of IP Crime in the UK today identifying key themes, such as emerging threats on supply chains, use of online content and complex technological systems that challenge UK enforcement agencies at markets, ports and distribution centres. The report is a valuable benchmark for spearheading the continuing dialogue drawing all interested stakeholders together to collaborate to raise awareness about the serious consequences of IP crime.

⁵ Safeguarding the Future – J. Boston, NZ

⁶ <https://publications.parliament.uk/pa/cm201213/cmselect/cmbis/367/36705.htm>

⁷ <https://www.acid.uk.com/misinformation-panic-3d-printed-guns/>

⁸

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/740124/DPS-007593_IP_Crime_Report_2018_-_Web_v2.pdf

“If intellectual property theft is one of the many threats facing our economic future within the design and the creative industries, the current Design Rights Infringement Research is not fit for purpose.

We do not need a snapshot of where we are, we need sound measurement criteria and acknowledgement that that IP challenges/trends, threats exist and will not go away unless they are tackled head-on with anticipatory governance and robust policy”.

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The Annual IP Crime and Enforcement Report is a chance for everyone involved in the business of securing the reputation of the market to see the big picture. The report is written by members of the IP Crime Group and coordinated and presented by the Intellectual Property Office. The forum itself provides an accessible conduit for those involved in the fight against IP crime to showcase best practice, make connections and better understand future challenges. The IP Crime Report comprises UK's experts in IP enforcement and the UK's enforcement community including the following: Enforcers – police, trading standards, border force and other public and private IP and fraud investigation and prosecution services; makers – manufacturers, merchants and trade associations and enablers – policy-developers, administrators and judges.

The common theme is to eliminate IP crime and the contrasting observations of this diverse group strengthen a collective approach. In this year's report some key themes emerge. But questions remain. The ACID case studies give a broad flavour of the type of infringements which are occurring, online infringement of designs, issues when responding to pitching and look alike products being copied by behemoth marketplaces with little hope of redress. Overall there is an emerging problem of online IP theft on search engines, social media platforms and online marketplaces.

Certain questions emerge about future planning: Is this approach coordinated and strong enough for a UK national strategy against counterfeiting piracy and copying which threatens our economic stability, especially within the creative industries? Should the UK be thinking about future-proofing our valuable IP with the creation of a **National IP Crime Enforcement Body**. Continued funding of the Police Intellectual Property Crime Unit (PIPCU) is of significant value but their powers for enforcement are limited because resources are over-stretched. The same can be said of Trading Standards in relation to IP.

IP Policy – Recent Design Rights' Infringement (DRI) Survey 2018

The IPO has recently published its Design Rights Infringement (DRI) research which, according to its original remit, was charged to create a robust methodology suitable for replication to measure the extent and scale of design rights infringement in the UK.

The research was commissioned in 2015 and has cost tens of thousands of pounds and has been beset by internal problems which the IPO have acknowledged. ACID, regrettably, cannot support this report as fit for purpose to fulfil the research objectives. The DRI Survey is now being positioned as "first steps in building a robust evidence based looking at infringement levels...." If it takes nearly four years and tens of thousands of pounds to create "first steps" how long does the design sector have to wait before a robust methodology is created? Design and innovation never sleep and the sector deserves policy aligned to the challenges it currently faces to succeed; not least against blatant design theft on and off line.

The main reasons for this are:

- **The Design Rights' Infringement Research (DRI) was based on Australian Patent Research.**
– This does not make sense. In Australia, there is no separate protection available for unregistered designs. Australian, US and China design patents are very different from UK and EU registered designs in that they are fully examined and there is a higher threshold of examination. The registration of a design is a simple deposit process (and relatively low fee) as opposed to cumbersome patent registration which can take years and costs tens of thousands. A patent is a strong monopoly right, though complex and requires significant cost and time resource to enforce. Designers and design entrepreneurs "design" prolifically; inventors, by nature of the time to have a patent granted, have a significantly longer-term approach to innovation.

"The UK Design Rights' Infringement Research (DRI) was based on Australian Patent Research.

Unlike the UK, there is no unregistered design right in Australian law – This does not make sense."

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- **Promised Focus Group meetings** to discuss the fundamentals of the questionnaire did not take place – only one was held with one designer design business, two legal representatives of design companies, one large and one small and two representatives of different design stakeholder groups. One focus group is not representative of views of UK designers. The resultant questionnaire was over complicated, the language confusing and the perceived level of IP understanding by those questioned was under-estimated.
- **DRI Hypotheses questioned** - Given designers rely on copyright as well as design rights to protect their work only measuring design rights' exclusively misses future tracking of swathes of different IP issues for designers such as 2D design, currently not tracked in the Online Copyright Index (OCI) (music, film, TV programmes, computer software, eBooks, video games). It is anomalous that search engines, online marketplaces and social media platforms will accept evidence of copyright for take down but will not accept evidence of unregistered designs, thereby leaving designers with little or no access to redress. How is this being measured now and how will it be measured in the future?
- **Futureproofing measurement such as 3D printing infringement.** Having a methodology for measuring incidences of 3D printing infringement will be critical for future proofing policy making. Currently, because there are no criminal provisions for unregistered design infringement, for the majority of designers there is no criminal offence to enforce
- **Brexit** - Given the effects of Brexit (and this research was commissioned in 2015 and did not start until 2016) it is unacceptable that the consequences of Brexit and the potential loss of EU UDR to UK designers was not considered. Deal or no deal, UK designers will be spectacularly disadvantaged if they lose EU unregistered design rights' protection in 27 EU countries. When the UK leaves the EU it will no longer be possible for UK designers, whose designs are first exhibited in the UK, to claim the EU design right protection in the other 27 member states of the EU. This is because in order for the EU right to come into being in the first place, this first publication / exhibiting must have taken place in an EU member state, and of course from 1 April 2019 the UK will not be an EU member state.
- **IPO and DCMS Consultation and collaboration** - Pre-research commencing, there appears to have been no communication and collaboration between the IPO and DCMS to establish how the future needs of designers could be met with research on design infringement which would include copyright.
- **IP issues facing designers** - There is little in this DRI report about which the Government (IPO) was not aware over a 15/20-year period, all of which has been consistently articulated by ACID and others over this time.
- **Data Analysis** – with such a small sample of usable evidence, a sophisticated method of analysis was used which gave confusing results. ACID's understanding of establishing corpus to generate an ontology necessary for methodology is that requires a sophisticated set of data and/or narrative from which to analyse. For example, of 194 replies in one section there is confusion in language used which suggests that the level of understanding of the respondents ranges from non-existent to poor to marginal to a reasonable knowledge of IP. Corpus would also require a set of questions which are understandable by the respondents. comparative rather than converting it into meaningful insight and consistency, there is no clear differentiation between the owners of registered and unregistered design rights whose attitudes may differ significantly.

Without the wisdom and knowledge from those stakeholders in the sector itself – representative bodies, designers/ designer makers and designer/ manufacturers as well as design agencies, The DRI Research is missing a vital ingredient.

IP Policy: intellectual Property & The Design Sector, how could we do things differently to safeguard the future in Designs Policy?

Key Recommendations:

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- Any new DRI research must revisit its original objectives and include copyright infringement to create an inclusive methodology for all types of 2D and 3D infringement in the design sector and to also include design processes and systems design. Otherwise swathes of different types of infringement in the sector will never be measured and it will be difficult to create clear, meaningful policy which serves the sector well. Now and for the next generation of designers.
- Industry representative Focus Groups need to be involved and engaged and brought together to discuss the research objectives which will be relevant to design generations. There is little point in research of this type being undertaken by educationalists, economists and IP lawyers alone. Without the basis of the wisdom and knowledge from those stakeholders in the sector itself – representative bodies, designers/designer makers and designer/manufacturers as well as design agencies, it is missing a vital ingredient.
- Before research questions are created it is critical there is engagement, collaboration and a series of Focus Group meetings to understand the issues designers face together with their perceived understanding of IP so that the language used is relevant, understandable and appropriate.
- Design sector research must move away from a model which is patent-based in its language, culture and understanding. Innovation through design is a fast-moving and successful business model and policy relevant to this sector needs to be nimble.
- Data Analysis on such a complex set of parameters should not only use sophisticated systems for analysis but also rely on the interpretation of narrative in a simple, practical Nurturing a future-focused political and intellectual culture, strengthening existing policy-making arrangements and embedding the future within policy frameworks is where a forward-thinking UK vision of IP protection and enforcement should lie in the future. and sensible way.
- Case study input, representative of significant variety of different issues should be guiding cornerstones on which to base future policy is based.
- Brexit – deal or no deal, the effects on designers could, potentially, be calamitous where the majority of designers in the UK will be left without protection under unregistered EU design rights in 27 other member states unless they publish first in those countries. Policy which includes measures to protect designers in the future within a different European dynamic needs careful policy consideration.

Conclusion

Nurturing a future-focused political and intellectual culture, strengthening existing policy-making arrangements and embedding the future within policy frameworks is where a forward-thinking UK vision of IP protection and enforcement should lie.

There is clear evidence that intellectual property theft is one of the many threats facing our economic future within the design and the creative industries. The ACID Council champions original designs within a framework of comprehensive and significant policy areas and it is with sadness that on this occasion we do not believe the current **Design Rights Infringement Research** is fit for purpose in its current format. We do not need a snapshot of where we are, (ACID has provided this consistently to Government over two decades). What we believe the design community needs is sound measurement criteria and acknowledgement that there are challenges/trends, threats existing and emerging that will not go away unless they are tackled head-on with anticipatory governance and robust policy-making. Collective and collaborative engagement can make this happen.

“Ultimately, safeguarding the future of design and IP (sic) relies on collaboration and those who care passionately about the future, yearn for a safe and rewarding prospect for future generations and are

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*motivated to pursue their dreams. In giving expression to this quest, the virtue of anticipation constitutes an essential ingredient. Moreover, this virtue needs practical realisation not only amongst individuals but also collectively and institutionally. At the political level, this must include a commitment to sound anticipatory governance*⁹.

Future-proofing our valuable IP with a UK-wide IP strategy which includes the creation of a National IP Crime Enforcement Body is essential as is the continued funding of the Police Intellectual Property Crime Unit (PIPCU) and Trading Standards to enable additional and robust powers for enforcement.

We start from a springboard of optimism for the design sector and current growth figures consistently reinforce this fact. We must ensure that current and future design and IP policy not only supports this position but ensures that the right regulatory framework support is in place as a vision for its future. The ACID Council is committed to continue to work positively and alongside Government to ensure this happens.

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⁹ Safeguarding the Future J Boston